

NOT FOR PUBLICATION — For upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

MIKEY HOLDER,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 1997-220
)	
VIRGIN ISLANDS WATER & POWER)	
AUTHORITY,)	
)	
Defendant.)	

ATTORNEYS:

Joseph Caines, Esq.
St. Thomas, U.S.V.I.
For the plaintiff,

Sharmane Davis-Brathwaite, Esq.
St. Thomas, U.S.V.I.
For the defendant.

MEMORANDUM

Moore, J.

This matter is before the Court on the motion of the Virgin Islands Water and Power Authority ["WAPA" or "defendant"] to dismiss all counts of the complaint filed in the above-captioned action for failure to state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). In resolving this matter, the Court accepts all well-pleaded allegations as true and views them in the light most favorable to the complainant. See *In re Tutu Wells Contamination Litig.*, 40 V.I. 279, 32 F. Supp. 2d 808 (D.V.I. 1999). Having carefully examined the complaint and

having construed it most liberally, the Court concludes that it must be dismissed.

Mikey Holder, the plaintiff in this action, was employed by WAPA as a line supervisor. On some unnamed date during his employment, he filed a complaint with the Equal Employment Opportunity Commission alleging that he was being harassed at work "due to his religious affiliation." (Complaint ¶ 5.) Some unnamed period of time later, WAPA terminated him, allegedly "due to his making his complaint to the EEOC." (*Id.* ¶ 6.) After his termination, he was not allowed to return to work "due to his religious beliefs." (*Id.* ¶ 8.) In sum, the plaintiff alleges that he was terminated because of his religion and because he complained to the EEOC, in violation of Title VII, 42 U.S.C. § 2000e-2(a) (Count I) and 42 U.S.C. § 1983 (Count II). He also makes a claim for damages in tort for intentional infliction of emotional distress (Count III). WAPA moves to dismiss all three counts.

Title VII

WAPA asserts that Holder's Title VII claim should be dismissed because the plaintiff failed to exhaust his administrative remedies and does not allege any reason that would

support waiver of that requirement.¹ Taking the allegations contained in the complaint as true, and drawing all reasonable inferences in favor of the plaintiff, the complaint fails to state a claim for a violation of Title VII since he does not allege that he either received a right-to-sue letter from the EEOC or requested a right to sue letter which the EEOC refused or failed to give him. See 42 U.S.C. § 2000e-5(f).² Accordingly, WAPA's motion to dismiss Count I will be granted.

¹ In 1997, when the motion to dismiss was filed, the defendant apparently proceeded under Fed. R. Civ. P. 12(b)(1), arguing that the timely filing of a complaint with the EEOC and receipt a right-to-sue letter is a jurisdictional prerequisite to bringing an action in this Court. (See Mot. to Dismiss at 2.) In its recent reply to the plaintiff's opposition, WAPA seems to proceed under a Fed. R. Civ. P. 12(b)(6) theory. Dismissal under Rule 12(b)(6) is the proper approach as there should no longer be any doubt that failure to exhaust administrative remedies is not jurisdictional, but rather an affirmative defense subject to waiver, tolling, and other equitable remedies. See *Angelino v. The New York Times Co.*, 200 F.2d 73, 87 (3d Cir. 1999) (district court should consider "the exhaustion and timeliness defenses under Rule 12(b)(6), rather than under Rule 12(b)(1)"); see also *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-98 (1982) (failure to timely file an EEOC complaint is not jurisdictional, but like a statute of limitations defense, is subject to waiver and equitable tolling).

² WAPA also argues that Holder's original complaint filed with the EEOC, but before his termination, would not go toward exhaustion of administrative remedies with respect to the alleged discriminatory retaliation claim. This is an inaccurate assertion of law. If the plaintiff had received a right-to-sue letter from the EEOC as the result of an investigation of the first complaint, he would not be prevented, on exhaustion grounds, from bringing an action alleging that WAPA fired him in retaliation for filing that complaint. See *Angelino*, 200 F.3d at 94 (reaffirming its rule that the "parameters of a civil action in the District Court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination" includes later charges of retaliation based on the original claim). This issue is moot, however, since Holder has not shown that he received a right-to-sue letter from the EEOC on the initial complaint.

42 U.S.C. § 1983

WAPA seeks dismissal of the plaintiff's section 1983 claim on the ground that WAPA is not a "person" as that term is used in 42 U.S.C. § 1983. This Court has already ruled that WAPA is not a "person" for purposes of section 1983. See *Eddy v. Virgin Islands Water & Power Auth.*, 35 V.I. 441, 454, 955 F. Supp. 468, 477 (D.V.I. 1997) (holding that as the 'alter ego' and governmental instrumentality of the Government of the Virgin Islands, WAPA is not a "person" as that term is used in section 1983).³ The plaintiff has presented no argument for revisiting the Court's earlier ruling in *Eddy*. Accordingly, the defendant's motion to dismiss the plaintiff's section 1983 claim will be granted.

Intentional Infliction of Emotional Distress

In setting forth his claim for intentional infliction of emotional distress, Holder merely alleges that the defendant intended to harm him and in fact caused "emotional distress and harm." To be liable for the tort of intentional infliction of emotional distress, the plaintiff is required to show conduct so

³ This ruling was left undisturbed by the Court of Appeals' recent decision in *Eddy v. Virgin Islands Water & Power Auth.*, 256 F.3d 204, 213 n.7 (3d Cir. 1997) ("We do not reach the question whether, as Eddy has argued on appeal, the District Court erred in holding that Eddy cannot sue WAPA itself and cannot sue the individual defendants in their official capacities under 42 U.S.C. § 1983.").

extreme or outrageous that it falls outside the bounds of decency. See RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). Here, the only facts alleged that might be relevant are that the plaintiff was fired due to religious discrimination and suffered "emotional distress and harm." These are not facts or circumstances that, if proved, would support a claim for intentional infliction of emotional distress. In any event, having dismissed the federal claims, the Court declines to exercise its supplemental jurisdiction over this remaining territorial claim. See 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Count III of the complaint will be dismissed.

An appropriate order follows.

ENTERED this 17th day of September, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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For the defendant.

ORDER

For the reasons stated in the accompanying Memorandum of
even date, it is hereby

ORDERED that the defendant's motion to dismiss the complaint
in the above-captioned matter is **GRANTED**. The Clerk of the Court
shall close the file forthwith.

ENTERED this 17th day of September, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies to:

Honorable Geoffrey W. Barnard
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